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FILED
MAY 22 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 100

EARL LEROY SCOTT, and HARRY D. CRONE, Executor Estate of ESTHER SCOTT CRONE, Deceased, *Petitioners*,

v.

HERBERT WILSON, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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INDEX

Subject Index

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Statute Involved	4
Statement of Case	5
Reasons for Granting the Writ	11
I. A Judgment in One Suit is Not *Res Judicata* in Another When the Issues and Questions to be Decided Are Not the Same	11
II. *Res Judicata* Is Not Available When the Issues to be Decided Were Only Incidentally Cognizable in the Prior Suit	15
III. *Res Judicata* Is Not Available When the Cause of Action in the Prior Suit Was Not Between the Same Parties Nor When the Parties in the Instant Case Were Not Adversary Parties in the Prior Suit	19
IV. During the Life of a Donee in Fee-Tail, the Issue of Such Donee Have No Estate or Interest in the Property Which can be Alienated or Devised	20
V. Respondent Is Barred By the Statute of Limitations	23
Conclusion	24
Appendix A	1a
Appendix B	7a
Appendix C	18a

Page

TABLE OF CASES CITED

Ash Sheep Co. v. United States, 252 U.S. 159, 64 L.ed. 507 18

Babcock v. Camp, 12 O.S. 11 13

Carter v. Grosnickle, 11 Ohio N.P. (NS) 465, Aff'd 88 O.S. 577 22

Cromwell v. County of Sac, 94 U.S. 351-353, 24 L.ed. 195, 197, 198 14

Dart v. Dart, 7 Conn. 250 21

Dungan v. Kline, 81 O.S. 371 .....21, 22

Heck v. Hlavin, (App.) 103 N.E. (2) 282, 61 O.L. Abs. 270 12

Hopkins v. Lee, 6 Wheat 109, 5 L.ed. 218 16

Hughes v. United States, 4 Wall 232, 18 L.ed. 303.... 19

In Re Youtsey, 206 Fed. 423 22

Koelsch v. Mixer, 52 O.S. 207 19

Lore v. Truman, 10 O.S. 45 .....13, 17

McComb v. Frink, 149 U.S. 629, 37 L.ed. 876 14

McCrory v. Park, 18 O.S. 1 19

North Carolina R. Co. v. Story, 268 U.S. 288, 69 L.ed. 959 16

Norton v. McLarney, 266 U.S. 511, 69 L.ed. 413..... 16

Ohio Fuel Gas Co. v. Mt. Vernon, 37 O. App. 159, 174 N.E. 260 18

Oklahoma v. Texas, 272 U.S. 21, 71 L.ed. 145..... 19

Partmar Corp. v. Paramount Pictures Theaters Corp., 347 U.S. 89, 98 L.ed. 532.....14, 16, 17

Radford v. Myers, 231 U.S. 725, 58 L.ed. 454 17

Rempe v. Ravens, 68 O.S. 113, 67 N.E. 282 17

Russell v. Place, 94 U.S. 606, 24 L.ed. 214 13

Page

State Ex Rel Kidder v. Eagle Insurance Co., 50 O.S. 252, 33 N.E. 1056, Aff'd 153 U.S. 446, 38 L.ed. 778.. 13

Suburban Mortgage Co. v. Hopwood, 83 O. App. 115, 81 N.E. (2) 387 18

United States v. International Building Co., 345 U.S. 502, 97 L.ed 1182 14

MISCELLANEOUS

Section 2305.04, Ohio Revised Code 4, 24

Section 5303.01, Ohio Revised Code 4, 23

Fourteenth Amendment to the Constitution of the United States 3, 4, 24

Title 28 U.S.C., Section 1257(3) 2

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Earl LeRoy Scott and Harry D. Crone, Executor, Estate of Esther Scott Crone, Deceased, Petitioners, pray that a writ of certiorari issue to review the orders of the Supreme Court of Ohio overruling Petitioners' Motion to Certify the Record from the Court of Appeals, Fayette County, Ohio, and denying Petitioners' Application for Rehearing.

OPINIONS BELOW

The proceeding against Respondent originated in the Court of Common Pleas, Fayette County, Ohio, which Court rendered an opinion in favor of Petitioners on April 12, 1955. Said opinion is not reported and is attached hereto as Appendix A.

The Court of Appeals, Fayette County, Ohio, reversed the judgment of the Court of Common Pleas in an opinion rendered November 8, 1955. The judgment and decree of said Court was entered November 21, 1955, is not reported and is attached hereto as Appendix B.

The Supreme Court of Ohio overruled Petitioners' Motion to Certify the Record on February 8, 1956, and denied Petitioners' Application for Rehearing on February 29, 1956. The said orders are not reported and are attached hereto as Appendix C.

JURISDICTION

The order of the Supreme Court of Ohio overruling Petitioners' Motion to Certify the Record from the Court of Appeals, Fayette County, Ohio, was entered February 8, 1956, and the order denying Petitioners' Application for Rehearing was entered February 29, 1956, thereby finalizing the judgment and decree of the said Court of Appeals in favor of Respondent.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

The following questions which are presented for review are intended to refer to the judgment and decree of the Court of Appeals, Fayette County, Ohio, as well as to the orders of the Supreme Court of Ohio.

I. Did the Supreme Court of Ohio deprive Petitioners of their constitutional rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in dismissing their Petition to quiet title to real property and granting Respondent's cross-petition to partition said property, on the alleged ground that a judgment in a prior case was *res judicata,*

(a) When the issues in the instant case were not the same as in the prior case and in fact were not even presented, controverted, investigated or determined by the Court in the prior case?

(b) When the issues in the instant case were only incidentally cognizable in the prior case and the evidence sustaining the issues in the prior case could not sustain the issues in the instant case?

(c) When the cause of action in the prior case was not between the same parties and the parties in the instant case were not even adversary parties in the prior case?

II. In the event the judgment in the prior case is not conclusive as to the issues in the instant case, did the Supreme Court of Ohio err in failing to hold that under the laws of Ohio a remainderman of a fee-tail estate cannot alienate or devise his interest in property until the first donee in-tail dies?

III. Irrespective of whether the judgment in the prior case is or is not conclusive as to the issues in the instant case, did the Supreme Court of Ohio err in failing to hold that any claimed right, title or interest of Respondent was barred by the statute of limitations?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

The pertinent provision of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "* * * Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes involved are:

Section 2305.04, Ohio Revised Code.

> "An action to recover the title to or possession of real property shall be brought within 21 years after the cause thereof accrued, but if a person entitled to bring such action, at the time the cause thereof accrues, is within the age of minority, of unsound mind, or in prison, such person, after the expiration of 21 years from the time the cause of action accrues, may bring such action within 10 years after such disability is removed."

Section 5303.01, Ohio Revised Code.

> "An action may be brought by a person in possession of real property by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest. Such action may be brought also by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

STATEMENT OF CASE

On August 16, 1954, Petitioners filed an action in the Court of Common Pleas, Fayette County, Ohio, to quiet title to a parcel of real property consisting of 47 acres situate in Fayette County, Ohio, adjoining the city limits of Washington Court House, and Respondent filed a cross-petition to partition the said 47 acres. Petitioners alleged that they had been in possession of the real property for a long time; that they had title in fee simple as tenants in common; and that Respondent claimed an undivided one-third interest without any right whatever. (R. 19)

The respective claims of Petitioners and Respondent arose as follows:

On April 3, 1906, John B. McLean, then a widower, executed a deed in fee-tail conveying a tract of land including the 47 acres in question to his daughter, Estella M. Scott, the *granting* clause being "to the said Estella M. Scott for and during her natural life and the remainder to the heirs of her body, their heirs and assigns forever", and the *habendum* clause being "to have and to hold the same to the only proper use of said Estella M. Scott for and during her natural life and the remainder to the heirs of her body, their heirs and assigns forever". (R. 63)

Subsequent to the execution of the deed, John B. McLean remarried and thereafter died on May 26, 1916. Following his remarriage he executed two wills. On July 24, 1914, he executed a will in which he devised the forty-seven acre tract to his daughter, Estella M. Scott, for life, with remainder to her children, Flossie Scott, Esther Scott and Earl LeRoy Scott in fee simple. (R. 86) This will was admitted

to probate in Franklin County, Ohio. Thereafter, John B. McLean suffered a serious head injury, was adjudged incompetent and a guardian was appointed for him. However, on December 29, 1915, he executed another will in which he devised the 47 acre tract to his wife, Mary F. McLean, for her natural life and after her death to the three grandchildren, Flossie Scott, Esther Scott and Earl LeRoy Scott. This will was admitted to probate in Fayette County, Ohio. (R. 42) At the time of the death of John B. McLean he was survived by his widow, Mary F. McLean, his daughter, Estella M. Scott, and her three children, Flossie, Esther and Earl, the latter two being the Petitioners herein.

Thereafter, a dispute arose between the widow and the daughter as to who was entitled to possession of the 47 acre tract, each claiming a life estate. The widow's claim was based on the second will of December 29, 1915, and the daughter's claim was based on the deed of April 3, 1906.

On January 2, 1917, a petition was filed on behalf of Estella M. Scott and her three children, Flossie Scott, Esther M. Scott and Earl LeRoy Scott, against the widow, Mary F. McLean, and others, in the Court of Common Pleas, Fayette County, Ohio, being Cause No. 14,696, to quiet title to the 47 acres. The petition, which was filed and verified by an attorney and not by any of the plaintiffs personally (R. 44), alleged that "the Plaintiff, Estella M. Scott, is the owner of an estate for the term of her life" in the land in question, "and in possession thereof; and that said Plaintiffs, Flossie Scott, Esther Scott and Earl E. Scott (sic), are the owners of estate in remainder in said lands after the termination of said life estate of

said Estella M. Scott", and "the said plaintiff, Earl E. Scott is a minor and prosecutes this suit by Estella M. Scott, his mother and next friend". (R. 40) No guardian *ad litem* was appointed for the minor plaintiff, Earl LeRoy Scott.

The sole issue in Cause No. 14,696 was to determine whether a life interest in the property in question passed to the daughter pursuant to the deed of April 3, 1906, or passed to the widow pursuant to the will of December 29, 1915. (R. 40) The Court found that the deed prevailed and the plaintiffs were "entitled to relief asked for in said Petition". The entry of judgment recited:

> "It is therefore ordered and adjudged that the title of said plaintiffs in and to the said lands described in their petition be and it is hereby forever quieted in said plaintiff, Estella M. Scott, for and during the term of her natural life, and in said plaintiffs, Flossie Scott, Esther Scott and Earl E. Scott, after the determination of the life estate of Estella M. Scott in fee simple in remainder, against any claim or demand of said defendants, or either of them, * * *". (R. 56)

In 1921 Flossie Scott, one of the children of Estella M. Scott, married Clarence Wohlheter. She died on November 20, 1931, seventeen years before her mother, leaving a will dated August 13, 1930, under which she devised to her surviving husband, Clarence, all real estate of which she was seized at the time of her death. (R. 74)

On June 23, 1934, Clarence Wohlheter, the surviving husband of Flossie Scott Wohlheter, filed an action to quiet title to the 47 acres in question in the Court of Common Pleas, Fayette County, Ohio, being Cause

No. 18,145, against his mother-in-law, Estella M. Scott, and her two surviving children, Esther Scott Crone (she having married Harry D. Crone) and Earl LeRoy Scott, the latter two being the Petitioners in the instant case. In his petition he alleged that the deed of April 3, 1906, was invalid and based his claim of ownership under the will of John B. McLean, dated December 29, 1915, which devised, subject to a life estate, an undivided one-third interest in said 47 acres to his wife, Flossie Scott Wohlheter, and which she in turn had devised to him. (R. 103)

On May 31, 1935, the Court of Common Pleas found that the deed of April 3, 1906, was a valid instrument and conveyed title to Estella M. Scott, "for the term of her natural life with remainder to the heirs of her body, their heirs and assigns forever", and "that the will of John B. McLean, executed after the delivery of said deed was inoperative to pass the title as alleged in said petition". (R. 112) No appeal was taken and the decree of the Court became final.

The first donee in-tail, Estella M. Scott, died on October 2, 1948, and on October 9, 1948, Clarence Wohlheter, still litigious, filed an action against Esther Scott Crone and Earl LeRoy Scott (Petitioners herein) in the Court of Common Pleas, Fayette County, Ohio, Cause No. 20,673, to partition the said 47 acres again claiming title as devisee of Flossie Scott Wohlheter. (R. 120) On June 8, 1951, Wohlheter's counsel dismissed the action without prejudice. (R. 126)

On February 12, 1953, Clarence Wohlheter purported to convey by quit-claim deed all of his claimed interest in the 47 acres to Herbert Wilson, the Respondent herein. (R. 81) On the strength of said

quit-claim deed, Respondent claimed an undivided one-third interest in said 47 acres and Petitioners brought the instant action to quiet title once and for all.

In the Court of Common Pleas below, Respondent traced his title to Flossie Scott Wohlheter and contended that the judgment and decree in Cause No. 14,696 altered the effect of the deed of April 3, 1906, by determining the interests not only of John B. McLean's widow and daughter which were in issue, but also of the three grandchildren, Flossie Scott Wohlheter, Esther Scott Crone and Earl Leroy Scott, which was not in issue. In other words, Respondent contended that the three grandchildren, instead of having an expectancy or bare possibility under the deed which, under the laws of Ohio, could not be alienated or devised during the life of the first donee in tail (their mother, Estella M. Scott), had acquired, by reason of the language employed by the Court in Cause No. 14,696, a vested remainder in fee simple subject to the life estate in their mother, which could be alienated and devised; and that the judgment in Cause No. 14,696 was *res judicata* and could not now be collaterally attacked. (R. 21)

Petitioners contended that under the deed of April 3, 1906, any interest which the children of Estella M. Scott might have by reason of being issue of a donee in tail, was contingent upon surviving their mother and, therefore, they had no alienable or devisable estate until after the death of their mother, the first donee in tail; that Flossie Scott Wohlheter, having predeceased her mother, had no interest in the 47 acres which could pass under her will to her husband, Clarence Wohlheter; that the quit-claim deed to Respondent conveyed nothing to him; and that the

judgment in Cause No. 14,696 was not *res judicata* because the question as to what estate the grandchildren took under the deed of April 3, 1906, or between themselves, was not in issue in Cause No. 14,696. (R. 26)

On April 25, 1955, the Court of Common Pleas found in favor of Petitioners and held that they were entitled to the relief sought and accordingly dismissed the cross-petition of Respondent. In its opinion the Court found that Flossie Scott Wohlheter, having predeceased her mother, had no interest which she could alienate during her lifetime or devise by will. As to whether the judgment in Cause No. 14,696 was decisive as to the interest of Flossie Scott Wohlheter and her successors in title, the Court said:

> "The question of the estates of the Plaintiffs *inter sese* was not an issue in the litigations of 1917 and, therefore, any judgment purporting to fix and determine those interests *inter sese* would be a nullity. Consequently, no title could be derived from such a judgment nor could it be the basis of an estoppel". (Appendix A)

An appeal on question of law was taken by Respondent to the Court of Appeals, Fayette County, Ohio. On November 8, 1955, the Court of Appeals found that the judgment of the Trial Court in Cause No. 14,696 adjudged the right, title and interest of the three grandchildren (the Petitioners and the Respondent's predecessor in interest) in that action; that the remainder interest in fee simple of each of the three grandchildren was vested; and that said judgment was *res judicata*. The court accordingly directed that the petition of the Petitioners should be dismissed and that the cross-petition of Respondent

should be granted. On November 21, 1955, the Court entered the order set forth in Appendix B.

A Motion to Certify the Record was filed by Petitioners in the Supreme Court of Ohio and on February 8, 1956, the same was overruled. Thereafter, an Application for Rehearing was filed by Petitioners and on February 29, 1956, the same was denied. (Appendix C)

The constitutional question sought to be reviewed was raised by exception to the judgment and decree of the Court of Appeals, which exception was duly noted on the Journal Entry filed November 21, 1955 (R. 12), and also by Assignments of Error filed in the Supreme Court of Ohio. (R. 13)

REASONS FOR GRANTING THE WRIT

I.

A Judgment in One Suit Is Not Res Judicata in Another When the Issues and Questions to be Decided Are Not the Same

The primary question is whether this suit involves the same claim, demand, or cause of action as was involved in the prior suit in Cause No. 14,696. To resolve this question, it is necessary to ascertain the issues in each case.

In Cause No. 14,696 (hereinafter referred to as the "prior suit"), the sole issue was to determine whether title to the property in question passed to Estella M. Scott (mother of Petitioners and Respondent's predecessor in interest) under a deed which created a fee-tail estate or passed to Mary F. McLean under a will which created a life estate with remainder in fee. In other words, the sole issue was whether the deed or the will should prevail. (R. 40)

The Court held that the deed prevailed and that the will was inoperative to pass title to the property in question. (R. 56) The question as to who would take upon the death of the first donee in-tail was not an issue in the prior suit and the Court of Common Pleas below so found. In its opinion, said Court specifically stated:

> "The question of the estates of the plaintiffs *inter sese* was not an issue in the litigations of 1917 (Cause No. 14,696) and therefore any judgment purporting to fix and to determine those interests *inter sese* would be a nullity. Consequently, no title could be derived from such a judgment nor could it be the basis of an estoppel". (R. 32)

No identity existed between the cause of action in the prior suit and the cause of action in the instant suit. The instant suit was a cause of action instituted by two individuals claiming title under a deed in fee-tail as heirs of the body of the first donee in-tail (by reason of having survived her), against a person claiming title as successor to an individual who was not an heir of the body of the first donee in-tail because she did not survive such donee. There is no question but that the prior suit was to determine which of two life tenants was entitled to possession of the 47 acres in question; while the instant suit was to determine the estate, if any, of the three children of the first donee in-tail *following her death.*

It is well settled that a matter in dispute may be the same in two actions and yet involve different causes of action. Where the cause of the two actions is different a prior judgment is no bar to a subsequent action. *Heck* v. *Hlavin,* (App.) 103 N.E. (2) 282, 61 O.L. Abs. 270.

It is equally well settled that when the second suit is upon a different claim or demand or cause of action, the judgment in the first suit operates as an estoppel only as to the points or questions *actually litigated and determined.* In short, in order to make a judgment at law conclusive in a subsequent suit on a different cause of action, the matters attempted to be disputed in the subsequent suit must have been put in issue in the first action and therein necessarily tried and determined. *Babcock* v. *Camp,* 12 O.S. 11, *Lore* v. *Truman,* 10 O.S. 45. The matters which are the subject of dispute in the instant suit were not put in issue in the prior suit and, therefore, such matters were never tried and determined. It follows that judgment in the prior suit should not operate as an estoppel.

It is also clear that an adjudication affects no claims which the Petitioners had no opportunity to litigate; and that the record works an estoppel only as to those matters which were capable of being controverted between the parties at the time of the proceeding in the prior suit. In the instant case, the estates of Flossie Scott Wohlheter, Esther Scott Crone and Earl LeRoy Scott, if any, have been put in issue. In the prior suit in which all 3 were joined as plaintiffs, the character and extent of their respective estates under the deed of April 3, 1906, was not put in issue and was not capable of being controverted between the parties at the time of the proceedings in the prior suit. *State Ex Rel Kidder* v. *Eagle Insurance Co.,* 50 O.S. 252, 33 N.E. 1056. Judgment aff'd 153 U.S. 446, 38 L.ed. 778. Nowhere does it appear in the record in the prior suit that the precise issues raised in the instant suit were determined in the prior suit. *Russell* v. *Place,* 94 U.S. 606, 24 L.ed. 214.

The theory of the law is that matters which have been fully investigated between the parties and determined by the Court shall not be again contested, and that the judgment of the Court upon matters thus determined shall be conclusive on the parties and never be subject to further inquiry. But a judgment in one action is not conclusive as an estoppel in another action as to points not actually litigated in the original action. *McComb* v. *Frink*, 149 U.S. 629, 37 L.ed. 876, *United States* v. *International Building Co.*, 345 U.S. 502, 97 L.ed. 1182, *Cromwell* v. *County of Sac*, 94 U.S. 351-353, 24 L.ed. 195, 197, 198. In the *Cromwell* case this Court said:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In summary, the issues in the instant suit were not presented, controverted, investigated or determined by the Court in the prior suit and therefore the judgment in the prior suit is not operative as an estoppel in a suit which is based entirely on a different cause of action. PARTMAR CORP. v. PARAMOUNT PICTURES THEATERS CORP., 347 U.S. 89, 98 L.ed. 532.

II.

Res Judicata Is Not Available When the Issues to be Decided Were Only Incidentally Cognizable in the Prior Suit

In the prior suit the Court of Common Pleas found in favor of the deed of April 3, 1906, and that the plaintiffs in that suit were entitled to the relief prayed for. In its opinion, it held:

> "It is, therefore, ordered and adjudged that the title of said plaintiffs in and to the said lands described in their petition be and it is hereby forever quieted in said plaintiff, Estella M. Scott, for and during the term of her natural life, and in said plaintiffs, Flossie M. Scott (Wohlheter), Esther Scott (Crone) and Earl E. (LeRoy) Scott, after the determination of the life estate of Estella M. Scott in fee simple in remainder, against any claim or demand of said defendants, or either of them, * * * ".

The Court of Common Pleas below held that the portion of the judgment above quoted purporting to fix the interests of Flossie, Esther and Earl was not in issue and any attempt to determine their interests would be a nullity and could not be the basis of estoppel. However, the Court of Appeals below reached an opposite conclusion, ruling that the judgment of the Trial Court in Cause No. 14,696 adjudged the right, title and interests of the plaintiffs, respectively, in that action; that the remainder interests in fee simple of each of the three children was vested; and that said judgment was *res judicata.*

Aside from the fact that the Court of Appeals erred in holding that the remainder interest of each of the 3 children was vested, as will be more fully shown in Part IV, *infra*, the fact remains that the so-called

remainder interest of the 3 children, as determined by the Trial Court in Cause No. 14,696, was not *res judicata* for the following reasons:

Any attempt by the Court in the prior suit to adjudge the respective interests of the 3 children constituted a finding which was not necessary for a judgment on the sole issue in that case, namely, did the deed or the will of John B. McLean prevail. This Court has frequently held that a finding which is not material to the principal action, or which is not necessary for a judgment, does not form the basis for a collateral estoppel. *Partmar Corp.* v. *Paramount Pictures Theaters Corp., supra.*

The character and extent of the estate which the three children took was considered only collaterally or incidentally by the Court in the prior suit in its determination of the main issue. It is well settled that the rule as to the conclusiveness of a judgment or decree of a court does not apply to points which, as in the instant case, come only collaterally under consideration or are only incidentally considered, or which is closer to the actuality in this case, can only be argumentatively inferred from the decree. *Hopkins* v. *Lee*, 6 Wheat 109, 5 L.ed. 218; *Norton* v. *McLarney*, 266 U.S. 511, 69 L.ed. 413; *North Carolina R. Co.* v. *Story*, 268 U.S. 288, 69 L.ed. 959.

As a matter of fact, the litigation in the prior suit did not give the three children an opportunity to be heard on the question as to what estates they took *as between themselves* because that matter was not in question. In any event, it would have been premature because all they had at that time was a bare expectancy which would ripen into an estate in possession only

after the death of their mother, the first donee in-tail. The three children could only have been heard on the question as to whether they took under the deed or under the will. This Court has frequently found that judgments become estoppels only because they affect matters upon which the parties have been heard but are not conclusive upon matters not in question or matters which are immaterial to the cause of action. *Radford* v. *Myers*, 231 U.S. 125, 58 L.ed. 454

Assuming, *arguendo*, that the Court in the prior suit adjudged that the interests of the three children under the deed of April 3, 1906, were vested in them at the time of that litigation, as the Court of Appeals below erroneously concluded that it did, such adjudication was obviously of a matter that was not presented for determination and of a matter not so necessarily involved as an issue that the judgment could not have been rendered without deciding that particular matter. *Lore* v. *Truman*, *supra*; *Rempe* v. *Ravens*, 68 O.S. 113, 67 N.E. 282. In other words, in order that a judgment may operate as *res judicata* and be conclusive evidence of a fact sought to be established by it, it must be made to appear that such fact was a material one in the prior suit. *Partmar Corp.* v. *Paramount Pictures Theaters Corp.*, *supra*.

A determination of the interests of the three children was not relevant or material in deciding the sole issue in the prior suit as the relief prayed for could have been granted without deciding the particular interest of the three children. It follows, therefore, that the judgment in the prior suit was no bar to the instant suit, especially where the second suit, as demonstrated in Part I, *supra*, is not for the same cause of action as in the prior suit.

The best and most accurate test as to whether a second suit is for the same cause of action as the first is to consider whether the same evidence would sustain both. *Ohio Fuel Gas Co.* v. *Mt. Vernon*, 37 O. App. 159, 174 N.E. 260. Petitioners respectfully submit that the evidence which sustained the judgment in the prior suit could not sustain a judgment in the instant case, whether it be for Petitioners or for Respondent, for the obvious reasons that since the judgment in the prior suit the first donee in-tail had died, thereby finally determining the persons who constituted the "heirs of her body"; and that the "heirs of her body" did not include Respondent's predecessor in interest as she had died prior to the first donee in-tail. In order for a trial court in an action to find that the judgment in a separate action is *res judicata* on the issues being tried, it would be required to find that the issues were identical and sustained by the same evidence. *Suburban Mortgage Co.* v. *Hopwood*, 83 O. App. 115, 81 N.E. (2d) 387. This, the Court of Appeals below failed to do.

Moreover, no evidence was introduced in the prior suit, nor was it necessary, to construe the deed in order to determine just what estates "the heirs of her body" took under the deed. The judgment in the prior suit is not conclusive of any question which, from the very nature of the case against the widow, Mary F. McLean, could not have been adjudicated in that suit. *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 64 L.ed. 507.

The fact of the matter is that the portion of the judgment in the prior case which Respondent alleges purported to fix the interests of Flossie, Esther and Earl, was an isolated passage and may aptly be described as immaterial, irrelevant and redundant. The

effect of a decree as an adjudication conclusive upon the parties should not be determined by isolated passages, but upon an examination of issues made and intended to be submitted, and which it was intended to decide. *Oklahoma* v. *Texas*, 272 U.S. 21, 71 L.ed. 145. It goes without saying that in the prior suit the interests of the three children *as between themselves* were neither made nor intended to be an issue, nor was it intended that such interests should be determined.

In summary, the doctrine of res judicata is not available to bar the instant case when the issues to be decided were only incidentally cognizable in the prior suit and the evidence which sustained the issues in the prior suit could not sustain the issues in the instant case.

III.

Res Judicata Is Not Available When the Cause of Action in the Prior Suit Was Not Between the Same Parties Nor When the Parties in the Instant Case Were Not Adversary Parties in the Prior Suit

In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties. *Hughes* v. *United States*, 4 Wall 232, 18 L.ed. 303. Any such judgment, however, is not conclusive on the parties in subsequent litigation unless they were adversary parties in the prior suit. *McCrory* v. *Park*, 18 O.S. 1, *Koelsch* v. *Mixer*, 52 O.S. 207. It is well settled in this Court and elsewhere that a judgment in a prior suit reaches and concludes only *parties to the issue* and does not affect persons who, though parties to the suit, were not adversary parties to the issue upon which the judgment was rendered.

It should be remembered that in the prior suit the Petitioners and Respondent's predecessor in interest were joined with their mother as parties plaintiff for the purpose of disputing the claim of John B. McLean's widow that she was entitled to a life estate under a will which became effective more than 10 years after the execution of the deed under which they claimed. At no time in the prior suit did they have a position adversary to each other. At that time they had a common interest in asserting that the deed from John B. McLean passed title to the 47 acres and that the will of John B. McLean was inoperative to pass title to his widow. As stated above, they had a mere expectancy which would vest upon the death of their mother, *provided they survived her*, which would increase or diminish in size depending upon the number of persons who constituted the class qualifying as heirs of the body of Estella M. Scott at the time of her death.

In summary, the Court of Appeals below erred in holding that the judgment in the prior suit was res judicata of the issues in the instant case and the judgment of the Court of Appeals should be reversed for the reason that the cause of action in the prior suit was not between Petitioners and Respondent's predecessor in interest nor were they in any respect adversary parties either on the record or in fact.

IV.

During the Life of a Donee in Fee-Tail, the Issue of Such Donee Have No Estate or Interest in the Property Which can be Alienated or Devised

The title which Respondent claims was derived from Flossie Scott Wohlheter. It is the position of Petitioners that Flossie, at the time of her death, had no

estate in the 47 acres which she could devise to her husband, Clarence Wohlheter, and accordingly the latter had no estate which he could convey by quit-claim deed to Respondent.

The interest which Flossie believed she possessed arose by reason of the fact that she was a child of Estella M. Scott, donee in-tail, under the deed of April 3, 1906. Under this instrument, John B. McLean conveyed the land "to the said Estella M. Scott for and during her natural life and the remainder to the heirs of her body, their heirs and assigns forever". Under the laws of Ohio, this created an estate in fee-tail. Since Flossie predeceased her mother by 17 years, did she at the time of her death possess an estate which she could devise by will? The law in Ohio, under the authority of *Dungan* v. *Kline*, 81 O.S. 371, is clear and undisputed that she did not.

In the *Dungan* case, the donee was Elizabeth Wilson. She had seven children, among whom were William and George. Both William and George predeceased their mother, but during their lifetime each conveyed an undivided one-seventh interest to George Dungan, who thereafter conveyed said interests to Harriet Dungan. The Court held that the issue of a donee in-tail, during the life of such donee, has no estate or interest in the lands which he can alienate. In its opinion, the Court quoted with approval the following language from *Dart* v. *Dart*, 7 Conn. 250:

> "But if he has no rights, nothing passes, not even a chose in action, what estate then had the issue of the first donee in-tail during his life? The answer is, none. Such is only an heir apparent or presumptive. His title is the bare possibility or mere chance of becoming eventually the heir in-tail; for the maxim is *Nemo est haeres*

> *viventis* and it is a well settled rule that a mere possibility cannot be released or conveyed; and the reason therefor is, that a release supposes a right in being."

Another landmark case in Ohio is *Carter* v. *Grosnickle*, 11 Ohio N.P. (NS) 465. This case was affirmed by the Court of Appeals and later by the Supreme Court of Ohio without opinion in 88 O.S. 577.

In the *Carter* case, the testator devised to his daughter and the heirs of her body 100 acres of land, thus creating a fee-tail estate in his daughter. A few years later the daughter deeded her interest in the 100 acres to one of her brothers, which brother, during the course of 22 years and during the life of the daughter, secured quit-claim deeds from 6 of the 8 children of the daughter. The Court held that under the decision in *Dungan* v. *Kline*, *supra*, the children had no estate in the land during the life of their mother which they could alienate. See also, *In Re Youtsey*, 206 Fed. 423.

As pointed out in Part III, *supra*, the "heirs of the body" of Estella M. Scott could not be determined until her death, as no one has heirs while living. The heirs of the body of Estella M. Scott constituted a class which could be enlarged by the birth of additional issue or diminished by reason of the death of issue at any time prior to the death of Estella M. Scott. It is inescapable that in order for an undivided interest in fee to vest in Flossie as an heir of the body of Estella M. Scott, she would have to be living at the time of her mother's death. Then and only then could Flossie acquire an estate which could be alienated or devised.

In summary, the decisions of the Ohio Courts do not justify the pronouncement of the Court of Appeals

below that Respondent's predecessor in interest, Flossie Scott Wohlheter, had a vested interest at the time of her death in the 47 acres which could be devised by will. For the foregoing reasons the judgment of the Court of Appeals should be reversed.

V.

Respondent Is Barred by the Statute of Limitations

The Court of Appeals below held that inasmuch as the judgment in the prior suit was *res judicata*, the statute of limitations did not constitute a bar to Respondent's claim. Petitioners believe that they have shown conclusively that the plea of *res judicata* is not available in the instant case. But irrespective of that fact, they contend that any possible claim Respondent may have in and to the 47 acres in question was barred by limitation on November 21, 1952, for the cogent reason that he or his predecessor in interest could have asserted his rights against the 47 acres the day after Flossie's will was admitted to probate, to wit, November 21, 1931, by virtue of the provisions of Section 5303.01, Ohio Revised Code, *supra*.

Flossie Scott Wohlheter died on November 20, 1931. Her devisee, Clarence Wohlheter, could have brought suit at any time thereafter to quiet his alleged title or to partition the real property. He did in fact file an action to quiet title in the Court of Common Pleas, Fayette County, Ohio, against Estella M. Scott, and Petitioners herein on June 23, 1934, in Cause No. 18,145, but that case was decided against him on May 31, 1935. Thirteen years later, on October 9, 1948, he filed an action in the same Court against the Petitioners herein, Cause No. 20,673, to partition the 47 acres but he dismissed that case without prejudice on June 8, 1951.

It is fairly apparent from the long history of litigation involving the 47 acres, commencing first in 1917, that an end to litigation should be reached. Even if we assume, *arguendo*, that Flossie had a vested interest which she could devise to her husband and which he could convey to Respondent, the conclusion is inescapable that Respondent and his predecessor in interest were neither vigilant nor did they prosecute their rights in a timely fashion.

In Ohio, the statute provides that "an action to recover the title to or possession of real property shall be brought within 21 years after the cause thereof accrued." See Section 2305.04, Ohio Revised Code, *supra*.

In summary, Respondent has slept on his rights and the erroneous conclusion of the Court of Appeals below that the claim of Respondent is not barred by the statute of limitations should be corrected.

CONCLUSION

The Supreme Court of Ohio, in dismissing the Petition to Quiet Title, has deprived Petitioners of their constitutional rights without due process of law in violation of the Fourteenth Amendent to the Constitution of the United States. The doctrine of *res judicata* is not a valid defense to the action brought by Petitioners to quiet title to their land, for the reason that the judgment in the prior suit, contrary to the finding of the Court of Appeals, did not adjudge "the right, title and interest" of Petitioners and of Flossie Scott Wohlheter, Respondent's predecessor in interest, for the reasons set forth at length in Parts I, II and III above.

Moreover, the Court of Appeals erred in holding that the interest of Respondent's predecessor in title became vested as a result of the judgment in the prior suit. The law in Ohio is well established and clear that during the life of a donee in-tail the issue of such donee has no estate or interest in the property which can be alienated or devised, as more fully shown in Part IV above.

The Court of Appeals, Fayette County, Ohio, also committed reversible error in holding that the claim of title asserted by Respondent in the instant case is not barred by the statute of limitations as more fully shown in Part V above.

WHEREFORE, Petitioners pray that this Petition for a Writ of Certiorari be granted to the end that the judgment and decree of the Court of Appeals, Fayette County, Ohio, may be reversed by this Court.

Respectfully submitted,

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